STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2005
v	No. 253946 Oakland Circuit Court
ROBERT MANDEL VANCLEAVE, Defendant-Appellant.	LC No. 2003-188872-FC

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced as a second-felony habitual offender, MCL 769.10, to three concurrent prison terms of ten to thirty years each. He appeals as of right. We affirm, but remand for correction of the judgment of sentence, which erroneously reflects that defendant was convicted of two counts of first-degree CSC and one count of second-degree CSC, MCL 750.520c(1)(a).

This was defendant's second trial. In his first trial, defendant was acquitted of one count of first-degree CSC involving penile penetration alleged to have taken place in Rochester Hills, Michigan, but the jury was unable to reach a verdict concerning two first-degree CSC charges involving digital penetration alleged to have taken place in Ferndale, Michigan. Defendant was retried on those two charges. At defendant's second trial, the information was amended to add a third count of first-degree CSC involving digital penetration in Ferndale, Michigan, which had been inadvertently omitted from the information.

In his first issue on appeal, defendant argues that the information was improperly amended to add a third count of first-degree CSC. We disagree. A trial court's decision to allow amendment of the information is ordinarily reviewed for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686; 672 NW2d 191 (2003). In this case, however, the record reflects that it was defense counsel who noticed that the information erroneously charged defendant with only two counts of first-degree CSC and acquiesced in the trial court's decision to correct the error by adding a third count of first-degree CSC. By affirmatively approving the addition of a third count of first-degree CSC, defense counsel waived any claim of error. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). An "apparent error that has been waived is 'extinguished'" and, therefore, is not susceptible to review on appeal. *Id*.

Even if the issue was not waived, it is apparent that the trial court did not abuse its discretion by amending the information to reflect three identical counts of first-degree CSC. Contrary to what defendant argues, the record from defendant's preliminary examination reflects that defendant was bound over for trial on "three charges of CSC I that occurred during the summer of '93 in the City of Ferndale," each involving digital penetration. Subsequently, however, the written return completed by the district court erroneously listed two counts of first-degree CSC and one count of second-degree CSC. Further, the information issued on February 25, 2003, only listed two counts of first-degree CSC; the third count was omitted altogether. The case was subsequently consolidated with a separate case charging defendant with a single count of first-degree CSC alleged to have been committed in Rochester Hills, Michigan. At defendant's first trial, defendant was acquitted of the lone charge in the Rochester Hills case, but the jury was unable to reach a verdict with respect to the charges in the Ferndale case. The discrepancy concerning the charges in the Ferndale case was subsequently discovered at defendant's second trial, whereupon the trial court amended the information to reflect that defendant was charged with three separate, identical counts of first-degree CSC in that case.

A trial court may permit a prosecutor to amend the information before, during, or after trial, unless the proposed amendment would unfairly surprise or prejudice the defendant. MCR 6.112(H); see also MCL 767.76 (an amendment may be allowed to cure "any defect, imperfection or omission in form or substance or of any variance with the evidence"). If the amendment changes the substance of the information, the defendant may be entitled to a continuance "unless it shall clearly appear . . . that he has not been misled or prejudiced by the defect or variance . . . ." MCL 767.76.

In the present case, the amendment cured an apparent clerical error in the information. Contrary to defendant's claim on appeal, the amendment did not add a new charge for which defendant never received a preliminary examination, but rather conformed the information with the charges on which the district court announced it was binding defendant over for trial following his preliminary examination. Thus, defendant was aware of the charges and the evidence supporting them, and he cannot claim that he was unfairly surprised or prejudiced by the amendment. Indeed, defendant never attempted to claim below that he was misled or prejudiced. Under these circumstances, the trial court did not abuse its discretion by amending the information at trial to reflect three identical counts of first-degree CSC.[1]

Next, defendant argues that the prosecutor committed misconduct by improperly bolstering the complainant's testimony. We disagree.

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[1] Defendant's assertion that the trial court improperly failed to notify counsel of the jury's note expressing apparent confusion concerning the charges is not properly before us because it has not been separately raised and argued. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, while the transcript does not reflect any record proceedings concerning the note, the jury's note is initialed by both attorneys, as is a note containing the trial court's response, wherein the court instructed the jury that it must decide the case based on the evidence presented and must not consider the complaint.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the prosecutor's conduct is reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Here, however, defendant failed to object to the prosecutor's conduct. Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Appellate relief is not warranted if a curative instruction could have eliminated any possible prejudice. *Id.* at 722; *Noble*, *supra* at 660.

It is improper for a prosecutor to ask a witness to comment on the credibility of another. *People v Messenger*, 221 Mich App 171, 180, 182; 561 NW2d 463 (1997). Under MRE 608(a), however,

> [t]he credibility of a witness may be . . . supported by evidence in the form of opinion . . . subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

But evidence of a witness' truthful character is *not* admissible if the defendant has only attacked the witness' *credibility*, but not her character for truthfulness, even if the defendant's theory is that the alleged events never happened. *People v Lukity*, 460 Mich 484, 489-491; 596 NW2d 607 (1999). In other words, for character evidence to be admissible under MRE 608(a), the defendant must accuse the witness of lying, not merely argue that she is not worthy of belief because, for example, she was suffering from emotional problems. See *id*. at 490-491.

In this case, because defendant personally accused the victim of lying—albeit after her mother testified—it is not clear or obvious that evidence of her character for truthfulness was not permissible under MRE 608(a). Thus, a plain error is not apparent. Further, to the extent the evidence could be considered inadmissible, a finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble*, *supra* at 660. Defendant has made no showing that the prosecutor was acting in bad faith. Additionally, the remark itself was very brief and any resulting prejudice could have been cured by an instruction upon timely request. For these reasons, defendant has failed to show that asking the single question concerning the victim's character for truthfulness amounted to plain error affecting defendant's substantial rights.

Defendant also alleges that the victim's cousin testified to hearsay statements made by the victim during the course of disclosing the alleged sexual abuse. However, defendant fails to identify any specific hearsay statements. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Therefore, this argument is deemed abandoned.

In any event, the cousin's testimony was not hearsay because it was not introduced for its truth, but rather to show that the statement was made. See MRE 801(c); *People v Dhue*, 444

Mich 151, 158-159; 506 NW2d 505 (1993). Additionally, the testimony was cumulative of the victim's testimony. Therefore, defendant has failed to show a plain error resulting in prejudice.

Next, defendant argues that he is entitled to a new trial because defense counsel was ineffective. We disagree.

Because defendant failed to move for a new trial or *Ginther*[2] hearing, review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id*. at 312, 314. That is, defendant must show that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

We reject defendant's claim that defense counsel was ineffective for failing to object to the addition of a third count of first-degree CSC. As previously discussed, the trial court properly allowed the information to be amended to conform with the charges on which defendant was bound over for trial following his preliminary examination. Because any objection would have been futile, defense counsel was not ineffective for failing to object. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

We also disagree with defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct, previously discussed in this opinion. Whether to object to an alleged impropriety is a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). In this case, defense counsel may have chosen not to object to the prosecutor's alleged improper conduct of bolstering the victim's credibility to avoid alienating the jury. Counsel may also have been concerned that the jury might perceive that defendant had something to hide. Defendant has failed to overcome the presumption that failing to object was a matter of sound trial strategy. Additionally, the cousin's testimony was not hearsay and, therefore, an objection would have been futile. *Kulpinski*, *supra* at 27.

Defendant fails to identify the victim's mother's statement that he claims constitutes "roundabout hearsay." Because defendant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claim, defendant's claim that counsel was ineffective for failing to object to this alleged hearsay testimony is deemed abandoned. *Watson*, *supra* at 587.

Defendant further argues that defense counsel was ineffective for failing to consult with or call Dr. Abramsky as an expert witness. We again disagree. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 250 Mich App 801; 649 NW2d 94 (2002). In particular, whether to call an expert witness is a trial strategy decision. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). To overcome the presumption of sound trial strategy, a defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving the defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

In this case, at a pretrial hearing, the parties agreed that Dr. Abramsky could testify concerning the typical reactions of a child abuse victim, but would not be permitted to testify whether the victim in this case was actually abused. The trial court agreed to limit any testimony by Dr. Abramsky accordingly, and indicated that anything beyond that would have to be addressed at trial. The prosecutor expressed an intent to call a rebuttal witness if such testimony was presented. Ultimately, defendant did not call Dr. Abramsky at trial.

Although Dr. Abramsky would have been permitted to testify concerning typical reactions of child sexual abuse victims, see *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995), because he was not called at trial and there is no other record of his proposed testimony, it is not apparent that his testimony would have made a difference at trial or deprived defendant of a substantial defense. The same is true with defendant's claim that Dr. Abramsky could have testified that defendant did not fit the profile of a pedophile. Also, there is no record support for defendant's claim that defense counsel failed to consult with Dr. Abramsky before trial. Therefore, review of this issue is precluded. *Hurst*, *supra* at 641.

Furthermore, defendant has failed to overcome the presumption that defense counsel elected not to call Dr. Abramsky as a matter of trial strategy. The prosecutor would have been permitted to cross-examine him concerning his opinions and possibly present a rebuttal expert, both of which could have led to additional adverse testimony.

Lastly, defendant's claim that defense counsel was ineffective for failing to make an opening statement is factually inaccurate. At the beginning of trial, defense counsel reserved his opening statement, stating that he would "make it later." That afternoon, at the close of the prosecutor's case, defense counsel made an opening statement. Accordingly, there is no merit to this claim.

For these reasons, we reject defendant's claim that he was denied the effective assistance of counsel.

Next, defendant argues that his double jeopardy rights were violated when the prosecutor amended the information to add a third count of first-degree CSC after his first trial. We disagree.

Initially, because defense counsel affirmatively agreed to the amendment, any error has been waived. *Riley*, *supra* at 449. Regardless, defendant has not established a double jeopardy violation. Whether double jeopardy applies is a question of law that is reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

Defendant correctly observes that the Double Jeopardy Clause prohibits multiple prosecutions for the same offense, *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002), and that "all charges against a defendant that arise out of a single criminal act, occurrence, episode, or transaction must be brought in one prosecution," *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993). Contrary to what defendant argues, however, all charges involving defendant's alleged sexual abuse of the victim in Ferndale were brought in a single prosecution. The addition of the third count of first-degree CSC did not involve a new prosecution, but the amendment of the information in defendant's original prosecution to conform with the district court's bindover decision at defendant's preliminary examination. Additionally, because the jury was unable to reach a verdict concerning the Ferndale charges at defendant's first trial, his retrial did not violate the Double Jeopardy Clause. *Lett*, *supra* at 217. For these reasons, we reject this claim of error.

Lastly, defendant argues that he is entitled to a new trial because he was denied his statutory right to a polygraph examination. We disagree. Whether defendant's statutory right to a polygraph examination was violated is a question of law subject to de novo review. *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003).

MCL 776.21(5) provides that a person accused of criminal sexual conduct "shall be given a polygraph examination or lie detector test if the defendant requests it." Under this statute, a defendant has an "absolute right" to receive a polygraph test upon request. *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985). An accused may demand a polygraph at any time before a verdict is rendered. *Phillips*, *supra* at 396.

The record reflects that defendant asked to be administered a polygraph examination before his first trial. The test was scheduled three times, but defendant repeatedly failed to appear. In October 2002, defendant finally appeared and informed the examiner that he had a heart condition. Because the test is considered stressful, the examiner refused to proceed unless defendant obtained the consent of his physician. Defendant's doctor refused.

On Monday, October 13, 2003, just before jury voir dire at defendant's first trial, defense counsel informed the court that defendant had called him on Friday and had informed him that he wished to take a polygraph examination. Counsel disclosed that he advised defendant to see his doctor, and to again explain the importance of obtaining his consent to this test. Counsel believed that defendant's doctor had again refused his consent, but had informed defendant that, if defense counsel or the police department sent him a letter explaining the importance of the test, he would grant his permission. Counsel informed the court that this "[d]oesn't make sense to me." Additionally, counsel expressed that the issue "could have been resolved a long time ago," before he became defendant's attorney. Defendant agreed that counsel's version of events was accurate. The prosecutor opposed any request for an adjournment of trial to schedule a polygraph test.

After jury voir dire, the trial judge telephoned defendant's doctor, on the record. The doctor acknowledged that defendant may have asked for his consent, but explained that he did not understand "where it was suppose[d] to be sent or what was suppose[d] to be sent." The doctor informed the court that defendant's medical condition involved the insertion of a "stint . . . or something like that, . . . and he didn't see there was that big of a problem" and that

defendant "could have" the test. The court thanked the doctor and asked him to "[w]ait to hear from [defendant]." The polygraph issue was not raised again on the record.

The record fails to support defendant's claim that he was denied his right to a polygraph examination, despite his offer to sign a waiver of liability. Rather, the record shows that defendant's doctor agreed to provide his consent for the test, and that he was instructed to "[w]ait to hear from [defendant]." Defendant apparently never called him. Thus, it appears that the doctor's written consent was never obtained, and, for that reason, the examination was not performed. We conclude that defendant has failed to show that there was any error in connection with his request for a polygraph examination, apart from defendant's own failure to contact his physician. Therefore, reversal is not warranted on the basis of this issue.

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence to reflect that defendant was convicted of three counts of first-degree criminal sexual conduct. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin